	)	**IN THE COURT OF MILITARY COMMISSION REVIEW**
UNITED STATES,	)	**GOVERNMENT MOTION FOR ADDITIONAL STAY OF DECISION**
Appellant,	)	
v.	)	C.M.C.R. Case No. 08-004
MOHAMMED JAWAD a/k/a "Amir Khan" a/k/a "Mir Jan" a/k/a "Sakheb Badsha,"	)	Interlocutory Appeal from the 19 November 2008 Ruling of the Military Judge on the Defense Motion to Suppress Out-of-Court Statements By the Accused Made While in U.S. Custody, D-021
Appellee.	)	Presiding Military Judge Colonel Stephen R. Henley

TO THE HONORABLE CHIEF JUDGE AND JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

This motion is timely filed pursuant to Court of Military Commission Review (CMCR) Rules 20 and 21.

ARGUMENT

In the interests of justice, the Government respectfully requests that this Court grant an additional 120-day stay of its decision in the above-captioned interlocutory appeal, until 17 September 2009.[1] A second stay is in the interests of justice and, given the circumstances, outweighs the interests of both the public and the Appellee, whose habeas case continues to proceed in federal district court.[2] On 22 January 2009, the President ordered comprehensive

[1] The Government is seeking similar 120-day continuances in the other pending military commissions cases.

[2] On 22 April 2009, the United States District Court for the District of Columbia denied the Government's motion to dismiss or, alternatively, to hold in abeyance the Appellee's habeas petition (attachment G).

reviews of detention policy (including military commissions) and of all the individual detainees at Guantanamo (including the Appellee). Those reviews are not yet complete, but significant progress has been made (attachment E). The President has decided to work to reform substantially and retain military commissions as one available and appropriate forum, along with Article III courts, for the prosecution of detainees at Guantanamo (attachment F). As a first step, and as a result of the Detention Policy Task Force's initial work, on 15 May 2009, the Secretary of Defense published and notified Congress of five significant proposed changes to the Manual for Military Commissions (attachment D), including rules that would exclude all statements obtained by the use of cruel, inhuman or degrading treatment, impose additional conditions on the use of hearsay, and provide the accused greater latitude in the selection of counsel. As required by law, however, proposed modifications to the procedures in effect in military commissions cannot take effect for 60 days from 15 May.

The Administration is committed to taking further steps to ensure that commissions are part of an overall system that best protects U.S. national security and foreign policy interests, while also insisting that justice is done in the case of every single detainee. These steps will include working with Congress now and in the future to reform our military commissions system to better serve those purposes. The Administration will shortly be proposing legislation to amend the Military Commissions Act of 2006, Pub. L. 109-366, not only to make the five rule changes noted above statutory, but also to make other significant changes to the commissions, including revising the rules governing classified evidence and further revising the rules regarding the admissibility of evidence. We anticipate that these changes will nevertheless permit cases pending before commissions to proceed, although no decisions have yet been made as to which specific detainees will continue to be prosecuted before commissions or whether they might be

prosecuted in Article III courts, or whether some alternative disposition of the detainees might be recommended. Given these issues, the Government submits that the interests of the public and the Appellee would be best served by granting the additional stay of the Court's ruling.

Facts

a. On 22 January 2009, the President issued Executive Order (E.O.) 13492, "Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities" (attachment A). This E.O. directed an inter-agency review of "the status of each individual currently detained at Guantánamo." E.O. 13492, § 4(a). The review participants[3] were tasked, first, to "determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantánamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States," and second, in the cases of those individuals not approved for release or transfer, "to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution . . . ." *Id.* at § 4(c)(2)-(3).

b. E.O. 13492 also directed the Secretary of Defense to "ensure that during the pendency of the Review . . . all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and *all proceedings pending in the United States Court of Military Commission Review*, are halted." *Id.* at § 7 (emphasis added).

[3] E.O. 13492 directed that the following officers participate in the review: The Attorney General, the Secretaries of Defense, State, and Homeland Security, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, and such other officers or employees of the United States as determined by the Attorney General. E.O. 13492, § 4(b).

c. On 22 January 2009, the President also issued E.O. 13493, "Review of Detention Policy Options" (attachment B). E.O. 13493 established a Detention Policy Task Force, co-chaired by the Attorney General and the Secretary of Defense, "to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice." E.O.13493, § 1(e). The E.O. directs that this Task Force complete its work in 180 days (i.e., by 21 July 2009). *Id.* at § 1(g).

d. Consistent with the President's order that steps be taken sufficient to halt military commissions during the pendency of the review, the Secretary of Defense ordered that no new charges be sworn or referred to commissions, directed the Chief Prosecutor of the Office of Military Commissions to seek continuances of 120 days in all cases that had been referred to military commissions and to petition the Court of Military Commission Review to hold in abeyance any pending appeals for 120 days (attachment C).

e. In accordance with that direction, on 23 January 2009, the Government filed a motion requesting this Court to stay its decision in the above-captioned appeal until 20 May 2009, which the Court granted on 4 February 2009.

f. In compliance with E.O. 13492, the Detainee Review Task Force is actively considering detainees' cases. It has made recommendations resulting in decisions to transfer or release more than 30 individuals. The status of the Appellee is under active consideration by one of the Task Force's Detainee Review Teams, which will make a recommendation on the disposition of the Appellee to the principals appointed by the President pursuant to E.O. 13492.

Under E.O. 13492, the Secretary of Defense must ensure that these proceedings are halted at least until that review is complete.

g. Further, as a result of the initial work of the Detention Policy Task Force, the Secretary of Defense has published five proposed changes to the Manual for Military Commissions (attachment D):

(1) Delete R.M.C. 202(b), MMC 2007, eliminating the dispositive effect, for purposes of jurisdiction for trial by a military commission under the M.C.A., of a prior determination by a Combatant Status Review Tribunal (or other competent tribunal) that an individual is an "unlawful enemy combatant."

(2) Revise R.M.C. 506, MMC 2007, to establish a right to "individual military counsel" of the accused's own choosing, provided the requested counsel is assigned as a defense counsel within the Office of the Chief Defense Counsel and is "reasonably available."

(3) Remove language in the "Discussion" under Military Commission Rule of Evidence (M.C.R.E.) 301, MMC 2007, that directs the military judge to instruct the members they should consider the fact the accused did not subject himself to cross-examination when he offers his own hearsay statement at trial but does not testify.

(4) Prohibit the use of statements obtained by cruel, inhuman or degrading treatment, regardless of when the statements were obtained. This would be accomplished by removing the distinction, in the standard for admissibility, between statements obtained before 30 December 2005 and those obtained on or after that date—which now potentially permits the admission of statements obtained by the use of cruel, inhuman or degrading treatment prior to 30 December 2005—and applying the standard currently in M.C.R.E. 304(c)(2), MMC 2007, to all statements.

(5) Revise M.C.R.E. 803(c), MMC 2007, to give the proponent of hearsay that is not otherwise admissible under M.C.R.E. 803(a) the burden of demonstrating that a reasonable commission member could find the evidence sufficiently reliable under the totality of the circumstances.

h. Pursuant to Section 949a(d) of Title 10, United States Code, the Secretary of Defense must inform the Committees on Armed Services of both the House and Senate of proposed modifications to the procedures in effect for military commissions at least 60 days before they go into effect.

i. The Secretary communicated these changes to the Armed Services Committees on 15 May 2009, and they are scheduled to go into effect on 14 July 2009.

j. The Administration also is working with the Congress on legislation to amend the Military Commissions Act of 2006, Pub. L. 109-366, in order to codify these rule changes and to further change the law governing military commissions. Other significant changes being considered are revisions to the rules governing the use of classified information, further revisions of the rules concerning the admissibility of evidence, and adjustments to the class of individuals subject to the jurisdiction of the commissions.

k. In short, the interagency teams are actively engaged in a thorough assessment of all the issues directed for review by the President. However, at this point that work is not complete and, while much has been accomplished, the Government does not at this time know precisely how the military commissions will be reformed, or even what the disposition of the Appellee will be, including whether he will be tried by military commission. As stated before, the review of this individual is not complete, and the 180-day Detention Policy Review is not due to be completed until 21 July 2009.

Discussion

a. CMCR Rule 22(c) provides that while interlocutory appeals are ordinarily decided within 30 days of oral argument or filing of briefs, whichever is later, the Chief Judge may grant an extension of that time period. For all of the reasons stated above, the Government submits that it would best serve the interests of justice and the Appellee to grant this motion for an additional stay of the Court's decision.

b. The requested stay is in the interests of justice, as it will permit the President and his Administration to complete a thorough review of all pending cases and of the military commissions process as a whole.

c. The interests of justice served by granting the stay outweigh the interests of both the public and the Appellee. Granting a stay of the decision is in the interests of the Appellee and the public, as the Administration's review of the commissions process and its pending cases might result in changes that would (1) necessitate re-litigation of issues in this case; or (2) if the case were to proceed at some later date, produce legal consequences affecting the options available to the Administration and the Appellee. It would be inefficient and potentially unjust to deny the motion for stay in this case before there is a final decision to proceed with this military commission—a commission that would, if resumed, proceed under a new set of rules.

d. Extending the stay in this case for an additional 120 days, from 20 May until 17 September 2009, will permit adequate time for the Administration to complete its review of the military commissions process and of the pending cases, to take appropriate actions to implement the five rules changes noted above, and to work with the Congress to further revise and reform the commissions process to ensure that it best serves the national security and foreign policy

interests of the United States and the interests of justice. The reason for seeking the requested delay, therefore, is not inconsistent with the interests of justice. To the contrary, it is intended to ensure the President has the time and opportunity to complete the policy and case-by-case reviews and to propose and implement changes to military commissions law and procedure, some of which will be best effected by legislation. In these circumstances, the additional delay of 120 days is not prejudicial to the Appellee, nor is it inconsistent with the interests of the public.

Scope of Request

Questions have arisen concerning the scope and effect of continuances that the Government has sought and that the judges have granted in commissions cases. The Executive Order directs the Secretary to take steps "sufficient to halt the proceedings," and it was in accordance with that obligation that the Secretary directed the Chief Prosecutor to seek the continuances that are now in place.[4]

The United States wishes to clarify the scope of the continuances that it now seeks. The Government does not seek to preclude the parties from submitting any filings, if they wish. The

[4] The Government's previous motions requesting continuances did not attempt to define the scope of the requested continuance; but in some cases, military judges have defined the scope of the continuance in ordering it. In the case against Ahmed Khalfan Ghailani, for instance, the continuance issued by the military judge expressly contemplated that discovery by the parties would continue, and that the judge would continue to take certain actions that do not require a "session." *See* Ruling on Government Motion for Continuance, *United States v. Ghailani* (Feb. 13, 2009). Similarly, in the case against the five charged September 11th co-conspirators, *United States v. Khalid Sheikh Mohammed*, the military judge recently issued a ruling (in response to a defense motion for relief related to the submission to the court of a document by the defendants) in which he assumed the prosecutors had not sought—and the military judge, in his earlier ruling on the continuance, had not ordered—"a 'halt' to any and all actions related to this case, but merely on the record hearings with counsel, the accused, and the military judge." The military judge concluded that his ruling was consistent with the prosecution's request and his earlier grant of a continuance, because "[s]ince recessing on 21 January 2009, the military judge has not called the Military Commission *into session*." Order on Defense Motion for Special Relief, *United States v. Mohammed* (Mar. 18, 2009) (emphasis added). *See* R.M.C. 905(h) (providing that the military judge may dispose of written motions without a session of the commission).

purpose of this motion is, in effect, to preserve the status quo as it existed on 22 January 2009 and as it exists on this date, and to preclude any unnecessary judicial decisions on contested questions until the President decides whether and on what terms, and as to which accused, the military commissions will resume. For that reason, the Government is asking the Court not to take any actions in the case—whether or not any "sessions" of court are involved—with the exception of any rulings the Court must make (including a ruling on the instant motion itself) in order to preserve the status quo as of this date to the greatest practicable extent.

Conclusion

For the foregoing reasons, the Court should extend the previously granted delay of further proceedings in this appeal until 17 September 2009.

ATTACHMENTS

A. Executive Order 13492

B. Executive Order 13493

C. Secretary of Defense Order of 20 January 2009

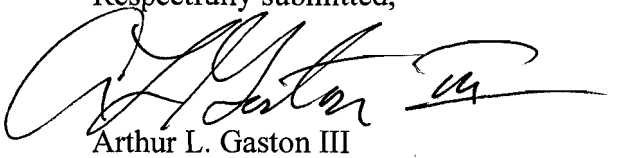
D. Amendments to Manual for Military Commissions, 2007

E. Olsen Declaration of 14 May 2009

F. Martins and Wiegmann Declaration of 13 May 2009

G. D.C. District Court Order of 22 April 2009

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was e-mailed to David J. R. Frakt, Maj, USAF, Detailed Defense Counsel, on this 15th day of May, 2009.

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